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Supreme Court, U.S.
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No. 813
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

KALAMAZOO METAL FINISHERS, INC.
Plaintiff-Appellee,

vs.

THE ORTMAN COMPANY,
Defendant,

and

WILLIAM A. ORTMAN,
Non-Party Appellant.

BEST AVAILABLE COPY

PLAINTIFF-APPELLEE, KALAMAZOO METAL FINISHER'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE MICHIGAN SUPREME COURT

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STATEMENT OF QUESTIONS INVOLVED

I.

SHOULD THE UNITED STATES SUPREME COURT GRANT THE PETITION FOR WRIT OF CERTIORARI?

Kalamazoo Metal Finishers, Inc.
Answers "No."

The Ortman Company Presumably
Answers "No."

William A. Ortman Answers "Yes."

II.

WAS THE MICHIGAN CIRCUIT COURT AWARD OF SUMMARY DISPOSITION APPROPRIATE UPON THE UNDISPUTED MATERIAL FACTS?

Kalamazoo Metal Finishers, Inc.
Answers "Yes."

The Ortman Company
Answers "Yes."
William A. Ortman Answers "No."

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This Brief addresses only those references made by Mr. Ortman to the litigation concerning commercial property located in Kalamazoo, Michigan.

COUNTER-STATEMENT IDENTIFYING ORDERS APPEALED

Appellant ("Mr. Ortman") appeals from an August 30, 1991 Order of the Michigan Supreme Court denying an application for leave to appeal the award of summary judgment in favor of Appellee ("Metal Finishers") and against The Ortman Company. The Ortman Company was the actual Defendant in the Michigan Circuit Court litigation. The Ortman Company did not appeal. (Lodging Exhibit 1 in).

Mr. Ortman refers to various other Orders, one of which does not even exist; most of which were never appealed.

Taken in chronological order:

1. Michigan's Ninth District Court awarded Metal Finishers summary judgment on July 20, 1988. (Lodging Exhibit 2 in). The Ortman Company accepted rental payments after the Notice to Quit was issued, which invalidated the Notice to Quit according to case law. Mr. Ortman never appealed the judgment and should not be permitted to first raise these issues before the United States Supreme Court.

2. Michigan's Ninth District Court entered an Order of Adjournment of a second eviction proceeding August 9, 1988. (Lodging Exhibit 3 in). Mr. Ortman never sought to clarify the status or effect of the order as a final order or have the question certified for interlocutory appeal, and took no action whatsoever - until he now raises it before the United States Supreme Court.

3. Kalamazoo Circuit Judge Schaefer never denied Metal Finishers request for a Temporary Restraining Order. No such order exists. Judge Schaefer saw no urgency to the request for a Temporary Restraining Order and asked that Metal Finishers wait until Judge Schma, the judge to whom the new Michigan circuit action was assigned, was available to the parties. Metal Finishers complied with the request, and later was awarded a Temporary Restraining Order by Judge Schma. (Lodging Exhibit 4 in). The only Defendant, The Ortman Company, was present by counsel and did not oppose the Temporary Restraining Order maintaining the status quo.

4. The Michigan Circuit Court entered a preliminary injunction maintaining the status quo on August 15, 1988. (Lodging Exhibit 5 in). The preliminary injunction was not opposed by The Ortman Company. Mr. Ortman was present in the courtroom on his own behalf and addressed the Court.

5. The Michigan Circuit Court entered a Summary Judgment Awarding Specific Performance and Conveyance of the Real Property December 2, 1988. (Lodging Exhibit 6 in). The award of summary disposition was not opposed by The Ortman Company. Mr. Ortman was present in the courtroom on his own behalf and addressed the Court.

6. Metal Finishers moved the Court of Appeals to dismiss Ortman's appeal for lack of standing before reaching the merits. The Court of Appeals instead reviewed all issues on appeal. The Court of Appeals ultimately agreed that Ortman was not a party to the Circuit Court proceeding and lacked standing to appeal after a full review on the merits. (Lodging Exhibit 7 in). There are no conflicting opinions or decisions.

LACK OF GROUNDS FOR WRIT OF CERTIORARI

In order for Mr. Ortman to establish adequate grounds for his Petition for Writ of Certiorari, Sup. Ct. R. 10 suggests that Mr. Ortman demonstrate:

> 1. Conflicting opinions between different United States Courts of Appeal.
>
> 2. Michigan's Supreme Court has issued a conflicting opinion with respect to a federal question.
>
> 3. The issues involve legal principles of major significance to the nation's jurisprudence, and which should be addressed or settled by the United States Supreme Court.

None of the above dynamics are even remotely involved in this matter.

This case is a commercial dispute between individuals and their related business entities. Mr. Ortman did not wish Metal Finishers to purchase the property pursuant to the option to purchase in the lease because he believes the property is now more valuable than the price set forth in the option. The other Ortman Company partners determined to honor the lease and the option to purchase. Not only does this case have no public interest whatsoever, various members of the bar would be hard pressed to find any aspect of the case at all interesting - even as lawyers. No federal or state agency, subdivision, officer, or question is involved in any manner. The legal principles which contributed to the Michigan Circuit

Court analysis and award of summary disposition include:

a) contract law concerning the exercise of an option to purchase contained within a long term commercial lease;

b) recognition of a partnership, regardless of internal documents and records, when partners hold themselves out to others and regularly conduct business as a partnership; i.e. partnership by estoppel; and

c) the remedy of specific performance as applied to the breach of an option to purchase real property.

Metal Finishers utilized ample, consistent, well established case law for all of the above principles and recognizes no need for new decisions of the United States Supreme Court clarifying or adding to these voluminous bodies of case precedent. The specific decisions supporting the Michigan Circuit and Appellate Courts are provided, ante.

APPELLANT'S MISSTATEMENT OF FACTS

Mr. Ortman's Petition for Writ of Certiorari contain so many gross errors that unfortunately, this section is made necessary.

First, The Ortman Company is hardly "defunct." Mr. Ortman does not get along with his brothers, the other partners, and for some time Mr. Ortman has refused to sign a renewal of the partnership certificate. This does not terminate the partnership. The Ortman Company, at least for all times relevant to this action,

continued to conduct business and hold itself out to others including Metal Finishers as a viable partnership.

As late as January 28, 1989, Mr. Ortman wrote Metal Finishers a threatening letter on stationary emblazoned "The Ortman Company." (Lodging Exhibit 8 in). Mr. Ortman signed as co-partner. This letter alone, setting aside the fact that a) the facts contained within are wholly inaccurate and b) a direct communication with Metal Finishers was a breach of ethics, should be sufficient to:

1. totally destroy Mr. Ortman's credibility in any tribunal as to whether The Ortman Company is defunct; and

2. subject Mr. Ortman to sanctions for otherwise attempting to mislead the Court.

Note that the letter was written while the case was pending before the Michigan Court of Appeals.

COUNTER STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. Nature of the Controversy

Metal Finishers, as assignee, entered into a lease agreement with The Ortman Company, a Michigan co-partnership, concerning property in Kalamazoo, Michigan. The lease contained an option to purchase which Metal Finishers chose to exercise. One of the three co-partners of The Ortman Company, Mr. Ortman, opposed Metal Finishers' right to exercise the option. The Ortman Company was unwilling to close the sale without the signature of all its partners.

Metal Finishers was forced to sue The Ortman Company for the specific performance of its right to purchase. Metal Finishers filed a Motion for Summary Disposition. Though not a party, Mr. Ortman contested Metal Finishers' claim for specific performance. The Circuit Court determined that Mr. Ortman was not a party and then ordered specific performance.

Mr. Ortman, however, filed a Claim of Appeal. The Ortman Company did not appeal the Circuit Court decision. Mr. Ortman seeks to appeal a decision in an action in which he was never a party.

B. Proceedings Below

On July 7, 1988, Metal Finishers filed its claim for specific performance against The Ortman Company. On July 12, 1988, Metal Finishers filed a Motion for Preliminary Injunction ("first hearing"). At the first hearing the Michigan Circuit Court allowed Mr. Ortman, as a partner in The Ortman Company, to address the Court. He was not recognized as a party to the action. (Portions of that transcript are attached; lodging Exhibit 9 in).

On October 14, 1988, Metal Finishers filed a Motion for Summary Disposition ("second hearing"). The Ortman Company did not oppose the Motion. (Portions of that transcript are attached; lodging Exhibit 10 in). Mr. Ortman was present at the second hearing. The Michigan Circuit Court allowed him to address the Court on the issue of his standing in the matter. The Michigan Circuit Court found on the record that Mr. Ortman was not a party and had no standing in the action (Portions of that transcript are attached; lodging Exhibit 11 in). The Court then heard Metal Finishers' argument in support of its Motion, noted The Ortman Company's concurrence with the

Motion, and ordered specific performance. (Lodging Exhibit 12 in).

Mr. Ortman took an appeal as of right. The Michigan Court of Appeals affirmed the Michigan Circuit Court Judgment. (Lodging Exhibit 7 in). The Michigan Supreme Court denied Mr. Ortman's application for leave to appeal. (Exhibit 1).

C. Statement of Material Facts

The Ortman Company is a Michigan co-partnership comprised of three brothers; James F. Ortman - Managing Partner, William Ortman, and John Ortman. The Ortman Company owns property on Glendening Road in Kalamazoo, Michigan ("Premises"). Title to the Premises was originally granted to The Ortman Company in 1956. (Lodging Exhibit 13 in). As of June 1, 1988, title to the Premises remained in The Ortman Company. (Lodging Exhibit 14 in).

In 1985 The Ortman Company entered into a Lease Agreement ("Lease" - Lodging Exhibit 15 in) concerning the Premises with Richard Halliday and Alfred Halliday. The Lease was for three years, from May 1, 1985 to April 30, 1988. The rent was $30,000.00 per year, payable in installments of $2,500.00 due on the first of each month. The parties understood the Premises were to be used by Metal Finishers, a business owned and operated by its President, Richard Halliday. (James Ortman Dep., p. 5; lodging Exhibit 16 in).

The Lease afforded Metal Finishers the option to purchase the Premises for $300,000.00 at any time during the three year term. This option was negotiated between the parties. (James Ortman Dep., p. 7).

Paragraph 13 provides for termination of the Lease under certain circumstances. Although on occasion the rent was not paid on time, at no time did The Ortman Company avail itself of its right to terminate. (James Ortman Dep., pp. 6-7) The Ortman Company never gave Metal Finishers the required written notification, which would have allowed 30 days to cure after the notice was received. The Ortman Company never acted to terminate the Lease because of late rental payments, or for any other reason.

As of April 15, 1988, the rent was current through April 30, 1988. (Lodging Exhibit 17 in). On April 21, 1988 Metal Finishers gave written notice of Metal Finishers' intention to exercise the option as described under Paragraph 22 of the Lease to James Ortman. (Lodging Exhibit 18 in). As of May 31, 1988 Metal Finishers had paid all real estate taxes. (Lodging Exhibit 19 in). Metal Finishers attempted to schedule a closing and tendered performance within sixty (60) days of the notification of intent to purchase.

The sale did not close because of internal disputes and disharmony among The Ortman Company partners. (James Ortman Dep. pp. 14-15, 17).

LAW AND ARGUMENT

I. Mr. Ortman's Petition for Writ of Certiorari Should Be Denied

Mr. Ortman cannot satisfy any grounds suggested in Sup. Ct. R. 10. Further, there was no error in the proceedings below.

Mr. Ortman is not a party in the action and lacks standing to appeal. Mr. Ortman is not, and never has been, a party to the action between Metal

Finishers and The Ortman Company. At the second hearing, the Michigan Circuit Court allowed Mr. Ortman to address the Court on the issue of his standing. The Court specifically found that Mr. Ortman was not a party to the action and absent a timely and successful motion to intervene, he had no standing to contest the Motion. (Exhibit 11).

Basic partnership case law dictates the Circuit Court's conclusion that Mr. Ortman is not a party to Metal Finishers' claim against The Ortman Company. A partnership is "a legal entity, separate from the individuals composing it." McIntosh v Detroit Savings Bank, 247 Mich 10; 225 NW 628 (1929). Accordingly, the Circuit Court action against The Ortman Company does not include Mr. Ortman as a party defendant. As Mr. Ortman is not a party; appeals are unavailable to him. Automatic Music and Vending Corp v Liquor Control Commission, 141 Mich App 458, 463; 367 NW2d 413 (1985).

Mr. Ortman could easily have followed that course prescribed in the Court Rules - he could have moved to intervene as a party defendant. Metal Finishers filed its Complaint on July 7, 1988. Mr. Ortman was in the courtroom as early as August 1, 1988, and appeared again on August 15, 1988. Mr. Ortman knew The Ortman Company had retained its own counsel. Mr. Ortman knew the Michigan Circuit Court was concerned with his standing to participate because he was not a party. Further, Mr. Ortman never noticed out his own motion for a hearing. Mr. Ortman complains of a "conspiracy" and of "secret" proceedings when in fact due notice was given to all parties. As an attorney, Mr. Ortman understood full well why he was not considered an "insider" - because he chose to remain a non-party.

II. Summary Disposition Was Appropriate

A. Metal Finishers Met All Requirements of the Lease and Option

The Lease provides that Metal Finishers may exercise the option to purchase the Premises at any time during its three year term.

Although the rent was not always paid on time, in April of 1988, when Metal Finishers notified The Ortman Company of its intention to purchase, all rent for the Premises had been paid in full. Metal Finishers also paid the real estate taxes. Metal Finishers tendered the full purchase price within 60 days of exercising the option.

B. The Ortman Company Waived any Defaults through its Continued Acceptance of Payments.

The Ortman Company accepted all the rental payments throughout the term of the Lease. (The Ortman Company also accepted rental payments after expiration of the original 3 year lease.) The Ortman Company waived all prior technical defaults.

In King-Blair Co v Schloss, 253 Mich 243; 234 NW 481 (1931), the plaintiff filed an action for specific performance of an option for an extension of a lease. The parties agreed to an option for the extension of plaintiff's lease for an additional term of ten (10) years. The defendant refused to honor the option, relying in part upon the plaintiff's subletting of a portion of the premises, in violation of the lease. The lease expressly provided that the option could be exercised only if the plaintiff complied with all terms

and conditions of the lease. The defendant argued that:

> Plaintiff had been in and was at the time of the institution of this suit, and at the time of the trial in default under the terms and covenants of its lease, the performance of and compliance with such covenants having been specifically made a condition precedent to the right to exercise the option.

King-Blair at 247.

The court acknowledged that the subletting of the premises was a violation of the lease, but affirmed the trial court's judgment for the plaintiff for specific performance of the option, reasoning that:

> However, it appears beyond question that this subletting was known to defendants and continued during the whole period without objection. . .[I]t would be inequitable to permit defendants to use it as a means of depriving plaintiff of its valuable rights under the option which it now seeks to have specifically enforced.

King-Blair at 247-48. As in King-Blair, The Ortman Company accepted all rent. The Ortman Company never afforded Metal Finishers written notice of a default, and took no action to terminate the Lease, or the option to purchase.

In Park Forest of Blackman v Smith, 112 Mich App 421; 316 NW2d 442 (1982), the plaintiff-lessor regularly accepted late rental payments from the defendant-lessee. The court found that the defendant

could reasonably expect that strict compliance was not required. Id at 428. Accordingly, Ortman's acceptance of payments constitutes a waiver of its right to strict compliance. Accord, McCranie v Rigsby, 172 Ga 860, 159 SE 233 (1931); Owners Illinois, Inc v Lakeshore Land Co, 457 F Supp 896 (WD Pa 1978); See Lessee's Breach of or Default Under Lease Agreement as Affecting his Right in Respect of Option to Purchase Under the Lease, 53 ALR 3d 435 (1973):

> The right of a lessee to obtain specific performance of an option to purchase under the lease, notwithstanding a breach of or default in the terms of the lease by the lessee, may be recognized where the lessor's acts preclude him from relying on the breach. Accordingly, the courts have generally held that the acceptance of rent after the lessee's breach or default in the terms of the lease constituted a waiver of the default so as to entitle the lessee to enforce the option to purchase.

Id § 8[a] at 449.

C. Specific Performance Was Appropriate

In Cimina v Broaich, 517 Pa 378, 537 A2d 1355 (1988), the tenant sought specific performance of an option to purchase. Defendant-lessor asserted that lessee failed to pay the real estate taxes, thereby breaching the lease agreement. This breach, lessor argued, defeated the claim for specific performance.

The court acknowledged that "[I]t is undisputed that the lease specified that the tenant must pay the real estate taxes on the leasehold premise". Cimina at

1357. In Cimina, however, lessor's wife paid the real estate tax each year, unaware of lessee's contractual obligation to make the payments. The court upheld the lessee's right to specific performance.

Applying fundamental principles of contract law, the court held that "only material failure of performance by one party discharges the other party: . . .an immaterial failure does not operate as such a discharge." Cimina at 1358; See Restatement of Contracts §274(1932). "[A] technical breach of a contract should not, ipso facto, defeat a claim for specific performance." Id

CONCLUSION

If Mr. Ortman has been aggrieved, it has been through the internal operations of The Ortman Company. Mr. Ortman claims Metal Finishers never had authority to occupy the premises - yet The Ortman Company admits that it intended to lease the premises, knew from the start that it was used for commercial purposes by Metal Finishers and determined to honor the option to purchase.

Unfortunately, the internal strife within The Ortman Company motivates Mr. Ortman to interfere with and employ any means to frustrate the legitimate property interests of Metal Finishers in its litigation with The Ortman Company.

The Michigan Circuit Court recognized there was no material dispute as to the facts and awarded summary disposition based upon the substantial case law governing this lease and its option to purchase. The Michigan Court of Appeals affirmed the decision after a review of the appeal on its merits. The Michigan Supreme Court saw no significant issues in the controversy and denied leave to appeal.

RELIEF REQUESTED

WHEREFORE, Plaintiff-Appellee Kalamazoo Metal Finishers, Inc. requests that this United States Supreme Court deny Mr. Ortman's Petition for Writ of Certiorari.

Dated: July 22, 1992

Respectfully submitted,

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